No. 89-262

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES OTHEL BORUFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing a district court order suppressing evidence.

1. On December 13, 1985, petitioner was indicted by a federal grand jury sitting in the Western District of Texas. The indictment charged petitioner with conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and possession of marijuna with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).

Before trial, petitioner moved to suppress evidence obtained as the result of a stop of a pickup truck. Petitioner called Kenneth Wayne Howell as a witness to help establish his standing to challenge the search of the truck. The district court nonetheless held that petitioner lacked standing. After the government announced its intention to call Howell to testify at trial, petitioner moved to suppress

his testimony on the ground that *United States* v. *Simmons*, 390 U.S. 377 (1968), barred the government from calling Howell as a witness. On April 21, 1988, the district court agreed and ruled that the government may not use Howell as a witness because he was not known to the government before he was called by petitioner at the suppression hearing. Pet. App. 23a-24a.

The court of appeals reversed. Pet. App. 1a-10a. The court held that the *Simmons* case does not bar the government from calling as a trial witness a third party who was called by the defendant to testify at a suppression hearing. The court noted that *Simmons* rests on the premise that defendant may not be forced to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert his Fourth Amendment right against unreasonable searches and seizures. The court concluded, however, that petitioner's privilege against compulsory self-incrimination was not implicated in this case, because the Fifth Amendment does not protect a defendant from the testimony of other individuals.

2. Petitioner contends (Pet. 8-30) that under the rationale of *Simmons*, the government may not call at trial a witness who was originally called by a criminal defendant at a pretrial suppression hearing, if the identity of the witness was not previously known to the government. Whatever the merits of petitioner's contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress the testimony of the witness. If petitioner is acquitted following a trial on the merits, his current contention will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his current contention, together with any other claims he may have, in a peti-

tion for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

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* Because this case is in an interlocutory posture, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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